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No. 03-1240

IN THE

Supreme Court of the United States

FLEXIBLE PRODUCTS COMPANY, RANDY PETERSON, DOUG CRUICKSHANK, PETITIONERS

v.

ROGER ERVAST

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

A panel of the Eleventh Circuit (the "Panel") has indicated that participants in ERISA plans that hold employer stock are "shareholders" who may sue for additional benefits as such outside of ERISA's exclusive remedial scheme. The reasoning the Panel used to reach this result is contrary to this Court's reasoning in *Aetna Health, Inc. v. Davila*, 2004 WL 1373230 (June 21, 2004). In fact, the Court recently reversed the Eleventh Circuit's ERISA preemption analysis in *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (11th Cir. 2003), *rev'd* 2004 WL 1431955, 72 U.S.L.W. 3310, a case upon which the Panel relied. Because the Eleventh Circuit's ERISA preemption analysis in both cases is contrary to *Davila*, the Court should also grant the petition for certiorari here.

REASONS FOR GRANTING THE PETITION

I. The Court should review this case to determine whether ERISA preempts claims that ERISA participants are "shareholders" by virtue of their participation in ERISA plans that hold stock in trust.

Respondent Roger Ervast ("Ervast") never addresses Petitioners' primary argument for granting certiorari. Ervast's entire argument is predicated upon the assumption that he was a "shareholder" under state law by virtue of his participation in an ERISA plan ("the plan") that held stock in trust for his benefit. However, this is precisely the question that the Court should grant certiorari to determine.

According to Ervast, the only issue is whether ERISA preempts a shareholder's claim "simply because the minority shareholder acquired his stock ownership interest through an ERISA plan?" (Respondent's Brief in Opposition, p. i.) Yet Ervast does not dispute that, at all times relevant to his claim, his only interest in this stock was in his capacity as an ERISA plan participant. He did not ever receive a distribution in shares from the plan – at which point he might arguably have had an ownership interest apart from his plan participation. Further, as the Panel Opinion correctly recognizes, the shares were held in trust for his benefit, and the trust documents are clear that participants do not acquire any right or interest in plan assets. *Ervast v. Flexible Products Co.*, 346 F.3d 1007, 1009 (3a). Therefore, Ervast's only connection or claim to this stock is his participation in the plan.

This case, thus, squarely presents the highly important federal question of whether ERISA preempts a claim that an ERISA participant is a "shareholder" under state law (with all the attendant legal ramifications) as a result of stock held in trust by the plan for the participant's benefit. This question is particularly important because of the large amount of employer stock that is held in Employee Stock Ownership Plans ("ESOPs") and 401(k) plans that are governed by ERISA. As a number of recent lower court opinions demonstrate, the prevalence of employer stock in such plans has engendered significant recent litigation. *See, e.g., Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090 (9th Cir. 2004); *Lalonde v. Textron, Inc.*, 369 F.3d 1 (1st Cir. 2004). Whether participants in such plans have rights as shareholders under state law, as well as under ERISA, is a significant question of

general application upon which this Court should provide guidance.

II. This case presents the Court with an opportunity to apply and elaborate upon the complete preemption standards announced recently in *Davila* in the context of claims arising from employer securities held by ERISA plans.

Ervast's contention that "*Davila* is fully consistent" with the Panel Opinion is clearly contradicted by a comparison of the two opinions. (Respondent's Brief, p. 19 (citing *Aetna Health, Inc. v. Davila*, 2004 WL 1373230 (June 21, 2004)). For example, the Panel focused intently on the type of claim Ervast brought rather than the type of relief he sought. In this regard, the Opinion states that:

> ... the court evaluating federal question jurisdiction *must parse the elements of the claim* to ascertain whether the claim, and not just the factual scenario, states a claim resonant of recovery under § 1132 [ERISA § 502]. In *Land*, we recognized our past precedent indicating that § 1132(a)(1)(B) claims "essentially are contract claims."

Ervast, 346 F.3d at 1014 (11a) (citations omitted) (emphasis added). The Panel then noted Ervast's claim was for breach of fiduciary duty, and concluded that this claim was not "akin" to a claim under § 1132(a)(1)(B) because Ervast claimed no right under the terms of the plan. *Id.* (12a-13a). However, in

Davila, this Court observed that Congress' intent to make ERISA's civil enforcement mechanism exclusive would be undermined "if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim." *Davila*, 2004 WL 1373230 at * 10.

The focus is, thus, not on the similarity of the elements of a state law cause of action to the elements of a § 502(a) claim, as the Panel assumed, but rather on whether the state law claim "duplicates, supplements, or supplants" ERISA's exclusive remedies. *Davila*, 2004 WL 1373230 at * 6. As a result, a participant may not evade ERISA's exclusive remedies by simply basing a claim for additional benefits on a state law theory with no analogue in ERISA. Yet this is precisely what the Panel permitted Ervast to do. By casting his claim as a state law shareholder claim, he masks the fact that the *remedy* he seeks is a larger distribution of benefits from the plan. In this manner, the Panel Opinion opens the door to participants to supplement ERISA's exclusive remedies by basing claims on alleged rights as shareholders rather than on the terms of plans that hold shares in trust for participants.

However *Davila* also instructs that state law claims that require reference to a plan in order to establish liability are not independent of the plan or ERISA, even if the claim is allegedly based on a legal duty independent of the plan. In *Davila*, the Second Circuit concluded that a claim under the Texas Health Care Liability Act ("THCLA") was not preempted, in part, because it found the "wording" of the plan was

immaterial to plaintiffs' claims because the claims invoked an external duty of care (just as Ervast's claim allegedly invokes a duty to shareholders that is external to the plan). *Davila*, 2004 WL 1373230 at * 9 (citing 307 F.3d at 309). This Court disagreed, finding that the wording of the plan was significant because liability would not exist if the treatment that had been denied was, in fact, not covered. *Id.* Thus, the Court found the claim did not arise independently of ERISA or the plan, despite the fact that the plaintiffs were purporting to base their claims on a legal duty independent of ERISA or the plan terms.

In this regard, the Second Circuit's argument is very similar to the Panel's reasoning. The Panel found Ervast was not claiming an entitlement to disclosure under the terms of the plan. Yet the terms of the Plan are still a necessary element to establish liability. Ervast would have no right to the stock at issue without the plan. The put option Ervast alleges he would have delayed exercising is part of the plan, and the plan would have to be interpreted to determine if Ervast had a right to delay the exercise of this right as he contends. More fundamentally, the trust document explicitly states that participants have no rights to assets held in trust. *Ervast*, 346 F.3d at 1009-10. Thus, whether Ervast has shareholder rights as a result of shares held in trust is a threshold issue that requires construction of the ERISA plan documents. As in *Davila*, therefore, his claim is not independent of the plan, despite the fact that he does not claim that he is owed additional benefits under the plan as written.

The Court should grant the petition to determine whether the Panel's reasoning is inconsistent with

Davila, or if *Davila* should be elaborated upon to make explicit that claims based on stock held by an ERISA plan do not arise independently of ERISA or the plan.

III. The Eleventh Circuit's opinion in *Land* does not stand for the proposition for which it is cited by Ervast, and actually suggests that this case, like *Land*, be remanded to the Eleventh Circuit for reconsideration in light of *Davila*.

Ervast cites *Land v. CIGNA Healthcare of Florida*, 339 F.3d 1286 (11th Cir. 2003), *rev'd* 2004 WL 1431955, 72 U.S.L.W. 3310, for the proposition that the Eleventh Circuit does not limit its complete preemption analysis to a comparison of state law claims to ERISA § 502(a)(1)(B) claims. (Respondent's Brief in Opposition, p. 19.) Contrary to Ervast's representations, however, in *Land* the Eleventh Circuit did not consider whether the state law claim at issue was sufficiently analogous to a § 502(a)(2) claim to trigger complete preemption, but rather, like the Ervast Panel, limited its analysis to § 502(a)(1)(B). *Land*, 339 F.3d at 1290. In fact, the only reference to § 502(a)(2) in the opinion is a description of this Court's opinion in *Pegram v. Herdrich*, 530 U.S. 164 (2000), which held that mixed eligibility and treatment decisions are not fiduciary decisions subject to suit under § 502(a)(2). The *Land* court then assumed that if mixed treatment and eligibility decisions are not subject to § 502(a)(2), they must also not be completely preempted under § 502(a)(1)(B).

Like the Ervast Panel, the *Land* court concluded that the claims at issue were not preempted because they were not claims for benefits under the terms of the

plan, but rather were "tort claims based upon the duty of care rather than contract claims based solely upon a denial of benefits." *Land*, 339 F.3d at 1293. The Ervast Panel followed *Land* in concluding that Ervast's claims were not completely preempted because they were not in the nature of contract claims under § 502(a)(1)(B). *Ervast*, 346 F.3d at 1015 (10a-12a) ("This conclusion exposes the preexisting error by the district court – Ervast's claim does not contest his distribution under the terms of the ESOP. Instead, he claims a right to information that, if he possessed, would have changed his decision making process with regard to the time he sought to collect his benefits.").

Of course, this reasoning was rejected in *Davila*, and, in fact, this Court recently reversed *Land* and remanded to the Eleventh Circuit for reconsideration in light of *Davila*. *Land v. CIGNA Healthcare of Florida*, 2004 WL 1431955, 72 U.S.L.W. 3310. Because of the similar reasoning used by the Eleventh Circuit in both *Land* and this case, the Court should also remand this case for reconsideration in light of *Davila* as well as any further complete preemption opinion the Eleventh Circuit announces on reconsideration in *Land*.

IV. This case properly presents the important federal question of whether there is an affirmative fiduciary disclosure obligation under ERISA.

Ervast argues that the question of whether ERISA imposes fiduciary disclosure requirements in the context of employer securities is not properly before this Court. (Respondent's Brief in Opposition, p. 17.) However, an analysis of the remedies available

under ERISA in this context is appropriate in order to determine whether the remedy Ervast seeks "duplicates, supplements, or supplants" ERISA's exclusive remedial scheme. *Davila*, 2004 WL 1373230 at * 6. Indeed, the Court in *Davila* analyzed whether the claim at issue there could have been brought under ERISA, at some point in time, as part of its complete preemption analysis. *Id.* Moreover, the district court here directly addressed this issue in its summary judgment ruling, which the Panel reversed. (30a-36a.)

As discussed more fully in the original petition, since this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), a split of authority has developed on two important questions concerning disclosure obligations under ERISA. A split has developed on the question of whether there is an affirmative fiduciary disclosure obligation at all under ERISA. *See Varity*, 516 U.S. at 506 (declining to "reach the question whether ERISA fiduciaries have a fiduciary duty to disclose truthful information on their own initiative...."); *Ehlmann v. Kaiser Foundation Health Plan of Texas*, 198 F.3d 552, 555 (5th Cir. 2000) (ERISA disclosure obligations limited to statutory list); *Bins v. Exxon Co.*, 220 F.3d 1042 (9th Cir. 2000) (recognizing fiduciary disclosure obligations). A split has also developed on the issue of whether the fact that a plan holds employer securities establishes a sufficient connection to benefits to subject statements or omissions about the sponsor's business to fiduciary scrutiny. *See, e.g., In re Enron Corp. Securities Derivative & ERISA Lit.*, 284 F.Supp.2d 511, 562, 657 (S.D. Tex. 2003) (finding an ERISA duty to disclose information about the sponsor's business); *In re Worldcom ERISA Litigation*, 263 F.Supp.2d 745, 766-

67 (S.D.N.Y. 2003) (same); *Stein v. Smith*, 270 F.Supp.2d 157, 173-74 (D. Mass. 2003) (failing to "fully inform" employees of material facts fiduciary CEO knew or should have known may state a claim for breach of fiduciary duty).

If a viable § 502(a) claim can be based on omissions about the sponsor's business relevant to a participant's decision to hold or sell company stock, certainly Ervast's claim that Defendants should have informed him about Flexible's merger discussions so that he could decide whether to keep or cash out his ESOP stock is "within the scope" of § 502(a). The Court should grant the petition to shed light on these controversial issues.

V. Ervast's argument that the Panel's rationale is not subject to review is without merit.

The overriding error that pervades the Panel Opinion is the assumption that only claims that are closely analogous to claims for benefits under the terms of a plan are preempted. In this regard, the Panel Opinion states: "Ervast's claim is not addressing whether he received what money he was entitled to under the ESOP, but rather whether he was entitled as a minority shareholder to the information Flexible, as the majority shareholder, possessed." *Ervast*, 346 F.3d at 1016 (13a). The Panel Opinion summarizes its holding by stating that the complete preemption doctrine was inapplicable "because the claim that Ervast brought against the defendants is not an ERISA civil action for the recovery of benefits due under the terms of the plan, but grounded in state law." *Id.* at 1016. These legal conclusions, as discussed more

fully in Petitioners' original brief, present important federal questions upon which this Court's guidance is necessary to provide consistency in the standards for determining complete preemption.

Ervast, however, argues that none of these conclusions, viewed in isolation, are determinative of the Panel's holding, and therefore each constitutes dicta. (Respondent's Brief in Opposition, pp. 8-16.) On the contrary, however, these legal conclusions, both individually and collectively, are the heart of the Panel's holding and are intimately intertwined with the central issue the Panel addressed, i.e., whether Ervast's claim is within the scope of ERISA § 502(a). As a result, the Panel's reasons for finding complete preemption inapplicable are properly subject to this Court's review, and present important federal questions upon which this Court's guidance is necessary to maintain consistency in the law.

VI. Ervast's claims of waiver are without merit.

Ervast makes two waiver claims that are not supported by the record. First, he argues that Petitioners did not argue that the Eleventh Circuit should consider aspects of ERISA § 502(a) other than subsection 502(a)(1)(B) to determine whether Ervast's claim falls "within the scope" of § 502(a). (Respondent's Brief in Opposition, p. 14.) This is simply not the case. Petitioners' response brief raises the issue of preemption under § 502(a) generally. Moreover, in their supplemental brief, Petitioners argued: "Similar remedies potentially available to Plaintiff include a claim for restitution from any breaching fiduciaries, equitable reinstatement of Plaintiff's put option and/or

the ESOP, and (whether alone or in combination with equitable remedies) a claim for benefits under § 502(a)(1)(B)." (Appellees' Supplemental Brief, p. 5.) Further, the district court addressed in detail the merits of Ervast's claim under § 502(a)(3). (30a-36a.) Therefore, the issue of whether the Eleventh Circuit erred by restricting its complete preemption analysis to a consideration of the similarity of Ervast's claim to a § 502(a)(1)(B) claim is properly before the Court.

Second, Ervast contends that Petitioners are challenging the preemption standard applied by the Eleventh Circuit in *Butero v. Royal Maccabees Life Insurance Co.*, 174 F.3d 1207 (11th Cir. 1999), and that this challenge was not made below. (Respondent's Brief in Opposition, p. 9.) This argument, however, is premised on an inaccurate characterization of Petitioners' position. Petitioners are not challenging *Butero* itself but rather the Panel's application of *Butero* to require a similarity between the elements of a state law claim and the elements of an ERISA § 502(a) claim as a condition precedent to a finding of complete preemption. It was not apparent until after the Opinion that the Panel was interpreting the *Butero* "akin to" standard to mean that a court must "parse the elements" of a state law claim and determine that such elements are sufficiently analogous to the elements of a § 502(a) claim in order to find the state law claim completely preempted. Ervast, 346 F.3d at 1014 (11a). Whether the Eleventh Circuit erred in this regard is an issue properly before this Court.

CONCLUSION

The Court should grant the petition to determine whether ERISA participants are shareholders with respect to shares held by ERISA plans. This is particularly true in light of the inconsistency between the Panel's reasoning and this Court's opinion in *Davila*.

Respectfully submitted,

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